UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOHN DOE,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 04-130-B-W
	)	
MARTIN MAGNUSSON, et. al,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON MOTION TO DISMISS

John Doe[1] has filed a 42 U.S.C. § 1983 motion seeking redress from four defendants for violations of his Fourteenth Amendment right to privacy and his Eighth Amendment right to be spared from cruel and unusual punishment. His complaint also has several counts under Maine law. The factual underpinning for all his claims is Doe's allegation that two officers improperly exposed to other inmates the fact that Doe was being treated for HIV/AIDS. The defendants move for dismissal of the complaint on the grounds that Doe fails to state a claim as to either 42 U.S.C. § 1983 count and, in the alternative, that they are entitled to qualified immunity. (Docket No. 17.) I now recommend that the Court grant the motion to dismiss as to the Fourteenth Amendment claim because, although it states a claim for a violation of a constitutional right to privacy, the defendants are entitled to qualified immunity because that right was not clearly established. As for the Eighth Amendment claim, I recommend that the court grant the motion to dismiss because it fails to state a claim. As for the state law claims I

[1] The plaintiff was given leave to proceed as John Doe due to the factual basis (and invasion of privacy thrust) of this suit. (Docket No. 11.)

recommend that the court decline to exercise supplemental jurisdiction and dismiss those counts without prejudice.

Discussion

Doe's Factual Averments

Doe was incarcerated at the Maine State Prison (MSP) from April 28, 2003, through September 26, 2003. He had been diagnosed with and was being treated for HIV/AIDS by Correctional Medical Services. On June 3, 2003, Doe was residing in Cell B-213 at the Medium B-Pod Unit along with another inmate. At 6:15 A.M. about twenty-five officers and three sergeants entered the pod for cell inspections. Captain Drake and Captain Spearing were the supervisors immediately in charge. Officers Ben Smith and Mick Collins, who Doe describes as veteran officers with numerous years of correctional service, conducted the inspection of Doe's cell.

Prior to the cell search Doe and his cellmate were strip-searched then ordered to vacate their cell and wait in the day room area until the completion of the search. During their search Smith and Collins were looking for and seized paper bags. They opened Doe's plastic cargo box (which at all times was properly secured) where Doe stored his "Keep on Person" medication. From this they removed specific items, including a large paper bag issued to Doe by Correctional Medical Services which contained numerous "Keep on Person" medications and a second, smaller bag containing two empty "Keep on Person" blister packs clearly marked with Doe's name and the name of the medications, Epivir and Niacin.[2] Instead of viewing the contents of the paper bags and returning the

[2] Doe explains that the blister packs were to be returned to the Correctional Medical Services pill line that morning when Doe went to breakfast so that he could receive his exchanges.

bags to their secure location inside the box, Smith and Collins dumped the contents of the large bag on the top of Doe's box and onto the floor, in plain view of Doe's cellmate.

After the cell search Doe and his cellmate were ordered back into their cell and the door was locked. Later that day Doe was called to the Captain's Row in the administration building. Here Doe was informed that an officer had found his two empty blister packs on the basketball rack outside the gymnasium office. Officer Collins worked the gymnasium on June 3, 2003, directly after the cell searches.

Motion to Dismiss and Qualified Immunity Standards

Pursuant to Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 (2002) a motion to dismiss for failure to state a claim in the context of a 42 U.S.C. § 1983 complaint is reviewed under the following standard:

> In civil rights actions, as in the mine-run of other cases for which no statute or Federal Rule of Civil Procedure provides for different treatment, a court confronted with a Rule 12(b)(6) motion "may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 66 (1st Cir. 2004).

With respect to the qualified immunity analysis, the First Circuit prefers a three stage line of attack:

> The Supreme Court has set up a sequential analysis for determining whether a defendant violated clearly established rights of which a reasonable person would have known. See Saucier v. Katz, 533 U.S. 194, 201-06 (2001). This court has construed that framework to consist of three inquiries: "(i) whether the plaintiff's allegations, if true, establish a constitutional violation; (ii) whether the constitutional right at issue was clearly established at the time of the putative violation; and (iii) whether a reasonable officer, situated similarly to the defendant, would have understood the challenged act or omission to contravene the discerned constitutional right." Limone v. Condon, 372 F.3d 39, 44 (1st Cir.2004). Under ordinary circumstances, the development of the doctrine

> of qualified immunity is best served by approaching these inquiries in the aforestated sequence. See Saucier, 533 U.S. at 201; Wilson v. Layne, 526 U.S. 603, 609 (1999).

Cox v. Hainey, 391 F.3d 25, 29 -30 (1st Cir. 2004). "The reason given for first addressing the alleged constitutional violation is that doing so assists in the development of the law on what constitutes meritorious constitutional claims." Tremblay v. McClellan, 350 F.3d 195, 199 (1st Cir. 2003) (citing Saucier, 533 U.S. at 201). "In many cases" Tremblay explains, "that approach is useful, especially where some novel theory is advanced." Id.

The following discussion of the first inquiry apropos Doe's privacy claim illustrates the difficulty sometimes posed by requiring the court to ask and answer in the first instance if there is a claim for a constitutional violation before undertaking the qualified immunity "clearly established" inquiry. It also demonstrates the wisdom of the approach dictated by Saucier v. Katz, 533 U.S.194, 201 (2001)[3], as the lingering uncertainty about the question of whether such a right to privacy exists has been fostered by the inclination of courts to leapfrog the merits of the underlying claim by uses of "even if," "assuming arguendo," or "whether or not."

Viability of Doe's Fourteenth Amendment Privacy Claim

United States Supreme Court

In Whalen v. Roe the United States Supreme Court was asked whether the "State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market." 429 U.S. 589, 591 (1977). In its decision the Court recognized that there was a constitutional safeguard apropos "the individual

[3] See also Brosseau v. Haugen, __ U.S. __, __, 125 S.Ct 596, 598 & n.3 (2004).

interest in avoiding disclosure of personal matters." Id. at 599. See also id. at 599 n. 24 ("'The concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion.")(quoting Professor Kurland The private I, University of Chicago Magazine 7, 8 (autumn 1976)[4]). "Recognizing that in some circumstances" the duty of nondisclosure, "arguably has its roots in the Constitution," the court concluded that New York's statutory scheme in question evidenced "a proper concern with, and protection of, the individual's interest in privacy." Id. at 605. The Court refrained from addressing "any question which might be presented by the unwarranted disclosure of accumulated private data--whether intentional or unintentional--or by a system that did not contain comparable security provisions, clarifying that it need not and would not decide the point." Id. at 605-06.

In Nixon v. Administrator of General Services the Supreme Court proceeded on the assumption that President Nixon had a legitimate expectation of privacy in his materials subject to the Presidential Recordings and Materials Preservation Act; it observed that "[t]his expectation is independent of the question of ownership of the materials," and, again, states it was an issue they did not reach. 433 U.S. 425, 457-58 (1977) (citing Katz v. United States, 389 U.S. 347, 351-353 (1967)). See also Whalen,

[4] I was unable to locate this article and I am not sure what the professor's first name is or whether private was actually left un-capitalized by the author.

429 U.S. at 607-08 (Stewart J., concurring) ("In Katz v. United States, 389 U.S. 347[(1967)][5], the Court made clear that although the Constitution affords protection against certain kinds of government intrusions into personal and private matters, there is no 'general constitutional right to privacy. . . . [T]he protection of a person's general right to privacy his right to be let alone by other people is, like the protection of his property and of his very life, left largely to the law of the individual States.' Id., at 350-351 (footnote omitted).") (footnote omitted); accord Nixon 433 U.S. at 455 n.18 (footnote indicating that Justice Stewart was standing by his concurrence in Whalen).

In the First Circuit

Since its equivocal articulation in Whalen the constitutional privacy right vis-à-vis nondisclosure of personal matters has 'evolved' in a rather awkward manner. Most important in this Circuit is Borucki v. Ryan, 827 F.2d 836 (1st Cir. 1987). In this case, weighing a claim that the disclosure to the press of the contents of the psychiatric reports (prepared pursuant to a court order in a criminal matter) violated the plaintiff's right of privacy, the First Circuit undertook an extensive analysis of Supreme Court and inter-circuit law on the constitutional right of nondisclosure. After analyzing Supreme Court cases touching on the subject, id. at 841-44, the Panel reached the conclusion "that Supreme Court cases decided prior to June 17, 1983 had not clearly established that a

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[5] Discussing the Fourth Amendment privacy protection Katz includes the following footnote:

> The First Amendment, for example, imposes limitations upon governmental abridgment of 'freedom to associate and privacy in one's associations.' NAACP v. State of Alabama, 357 U.S. 449, 462. The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too 'reflects the Constitution's concern for the right of each individual 'to a private enclave where he may lead a private life. "' Tehan v. United States ex rel. Shott, 382 U.S. 406, 416. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.

389 U.S. at 350 n.5 (quotation marks are as they appear in the footnote).

constitutional right of privacy would be implicated by state disclosure of the contents of a court-ordered psychiatric report." Id. at 844. The Panel then recognized that the Third and Fifth Circuits had decisions prior to June 1983 that identified "an independent right of confidentiality applicable to personal information contained in medical, financial, and other personal records." Id. at 845 (citing United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir.1980), Plante v. Gonzalez, 575 F.2d 1119, 1132 (5th Cir.1978), Duplantier v. United States, 606 F.2d 654, 670 (5th Cir.1979), and Fadjo v. Coon, 633 F.2 1172 (5th Cir. 1981)); see also id. at 846 -47 (collecting District Court cases on the subject). It also noted that the Sixth Circuit held in J.P. v. Davis, 653 F.2d 1080 (6th Cir. 1981) that a constitutional right to privacy was not implicated by the broad dissemination of intimate biographical information – such as alleged prostitution, pregnancy, nude modeling, and psychiatric, alcohol, drugs, and sexual problems -- concerning juveniles and their parents. 827 F.2d at 846-47 & n.15. The Borucki Panel recognized that it was unclear whether or not the right to confidentiality only extended to personal information that concerns "an area of life itself protected by either the autonomy branch of the right of privacy or by other fundamental rights or whether, to the contrary, the right of confidentiality protects a broader array of information than that implicated by the autonomy branch of the right of privacy." Id. at 841-42.

Ultimately, the First Circuit concluded that -- with Whalen having left the question open and with there being a split in the circuits as to whether the right to privacy includes a general right of nondisclosure of personal records -- "it was not clearly established that a constitutional privacy right would even be implicated" by the disclosure. Id. at 847-48. "But even assuming there was such a clear constitutional

right," the Panel reasoned, "the facts of decided cases did not provide sufficient indication of how that right would be weighed against competing interests in a case such as this. There were, arguably, interests to be balanced in this case." Id. at 848.[6]

In a subsequent case the First Circuit reflected:

> Even if the right of confidentiality has a range broader than that associated with the right to autonomy, but cf. Borucki, 827 F.2d at 841-42 (suggesting that the right of confidentiality protects only information relating to matters within the scope of the right to autonomy), that range has not extended beyond prohibiting profligate disclosure of medical, financial, and other intimately personal data. See id. at 841 n. 8 & 842 (collecting cases).

Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174, 183 (1st Cir. 1997) (emphasis added). And more recently a First Circuit Panel, in a case challenging sex-offender registration, dodged the question of whether, "in the abstract, ... the confidentiality branch of the constitutional right to privacy prohibits the disclosure of information about a released felon, including such information as his name, address, and convictions." Dickinson v. Chitwood,181 F.3d 79, 1998 WL 1085684, 2 (1st Cir. 1998) (unpublished disposition).

Doe relies on Pouliot v. Town of Fairfield as establishing the right in question. Ruling on a motion to dismiss Judge Singal explained:

> Although the limits of the claim are uncertain, it is at least clear that the First Circuit has not foreclosed a constitutional claim based on the type of disclosure that Plaintiff has alleged. .... For purposes of a motion to dismiss, therefore, Plaintiff's allegation that Defendants communicated to the press medical information they had received in confidence is sufficient to state a claim for violation of Plaintiff's privacy rights protected by the Fourteenth Amendment.

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[6] In a footnote the Panel indicated: "We intimate no opinion as to whether use of a balancing test is appropriate. We merely observe, for purposes of our qualified immunity analysis, that a majority of cases decided as of June 1983 had used some form of a balancing test." Id. at 848 n. 21.

184 F.Supp.2d 38, 50 (D. Me. 2002).

The issue was again joined in summary judgment pleadings. The case, by then assigned to me per party consent, I analyzed the question in the following manner:

> Vega-Rodriguez only goes as far as to say that the confidentiality branch does not go beyond the disclosure of medical information or intimately personal data; it does not establish the parameters of this right. In contrast to the First Circuit, both the Third Circuit and the Seventh Circuit have directly addressed the question and have found there is a right to privacy in one's medical information. See Doe v. Delie, 257 F.3d 309, 315 (3rd Cir.2001); Denius v. Dunlap, 209 F.3d 944, 956 (7th Cir.2000).
>
> During the 1990's the circuit courts varied in determining the scope of the confidentiality branch of the right of privacy. For example, the Tenth Circuit held that the state's release of intimate and personal information contained in a diary violated the confidentiality branch because, although the information was not "extremely sensitive in nature" or embarrassing, it was personal and there was an expectation of privacy. Sheets v. Salt Lake County, 45 F.3d 1383, 1388 (10th Cir.1995). The Eighth Circuit, having a requirement similar to the Tenth Circuit, states that the "protection against public dissemination of information is limited and extends only to highly personal matters representing the most intimate aspects of human affairs" but further states that the disclosure "must be either a shocking degradation or an egregious humiliation... or a flagrant breach of a pledge of confidentiality which was instrumental in obtaining the personal information." Riley v. St. Louis County of Mo., 153 F.3d 627, 631 (8th Cir.1998) (citing Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir.1996)). The court found that the police department's photographing of the plaintiff's deceased son, displaying the photo at a public assembly, and making slanderous comments regarding the deceased's alleged gang activities did not violate her in avoiding disclosure of personal matters. Id. at 631.
>
> In regard to cases involving the confidentiality branch, the constitutional right to non-disclosure appears to be limited to HIV, AIDS, mental health, matters of an embarrassing or humiliating nature, or matters in which the person had a legitimate expectation of confidentiality. Although the fact that Pouliot was being treated for diabetes is personal information, the disclosure of such information does not fall within this realm. Thus, I find that Defendant's 1999 disclosure to the media that Pouliot is being treated for diabetes is not a constitutional violation.

226 F.Supp.2d 233, 247-49 (D. Me. 2002) (some citations omitted).

Other District Courts in this circuit have also wrestled with the constitutional-privacy-right-to-non-disclosure nebula. See Demers ex rel. Demers v. Leominster School Dept., 263 F.Supp.2d 195, 203 n.4 (D. Mass. 2003) ("Vega-Rodriguez only says that the confidentiality branch does not go beyond the disclosure of medical information or intimately personal data; it does not establish the parameters of this right."); Corbin v. Chitwood, 145 F.Supp.2d 92, 97 -99 (D. Me. 2001) (viewing Vega-Rodriguez as narrowing the right to profligate disclosure of medical, financial, and other intimately personal data); Kassel v. U.S. Veterans Admin., 682 F.Supp. 646, 650 (D.N.H. 1988) ("This split in the Circuits [recognized in Borucki] was not reconciled by 1985, when the asserted cause of action arose in the instant case. Based on Borucki, the Court finds that plaintiff's constitutional right of privacy in his confidential personnel records was not clearly established when the cause of action allegedly arose."); Hansen v. Lamontagne, 808 F.Supp. 89, 94 -95 (D.N.H.1992) (discussing Kassel, concluding: "[T]he court finds the law still does not 'clearly establish' a constitutional right to privacy in the nondisclosure of confidential information").[7]

[7] The District Court explained further:

> Plaintiff's reliance on Whalen is to no avail. As noted above, the Whalen Court stated it did not decide whether the disclosure of private data would violate the Constitution. See 429 U.S. at 605-06. Plaintiff's reliance on Nixon is similarly unavailing. As stated earlier, *Nixon* did not establish a clear rule that disclosure of confidential information violates the Constitution. See 433 U.S. at 455-65. Finally, plaintiff finds no support in Borucki. The Borucki court stated explicitly that Whalen does not clearly establish a constitutional right of privacy against nondisclosure. See Borucki, 827 F.2d at 842. The Borucki court also indicated that *Nixon* did not clearly establish such a rule. See Borucki, 827 F.2d at 844 n. 13. Furthermore, the circuit court split referred to in Borucki has not been resolved, which is additional evidence that plaintiff has no clearly established constitutional right.

Id. at 94-95 (footnote omitted).

View from Other Circuits

There is a right

In 1987, the Seventh Circuit's Pesce v. J. Sterling Morton High School, a case involving a school psychologist/student right of confidentiality, stated: 'The Federal Constitution does, of course, protect certain rights of privacy including a right of confidentiality in certain types of information. 830 F.2d 789, 795 (7th Cir. 1987) (citing Whalen v. Roe, New York v. Ferber, 458 U.S. 747, 759 n. 10 (1982), H.L. v. Matheson, 450 U.S. 398, 435 (1981) (Marshall, J., dissenting), and Nixon). After discussing Whalen and Nixon, the Panel explained that courts have adopted a balancing approach, in which the state interest in the disclosure is weighed against the individual's privacy interest, when evaluating claims of the right to confidentiality "as derived from the privacy right." Id. at 796.

In Harris v. Thigpen the Eleventh Circuit discussed the question as follows:

> With regard to the right asserted on this appeal, it is clear that prison inmates, in spite of their incarceration, "retain certain fundamental rights of privacy." Houchins v. KQED, Inc., 438 U.S. 1, 5 n.2 (1978); see Torres v. Wisconsin Dep't of Health & Social Servs., 838 F.2d 944, 951 (7th Cir.1988) (observing that "inmates do retain some constitutional right to privacy"), cert. denied, 489 U.S. 1017 (1989). The precise nature and scope of the privacy right at issue in this case is rather ill-defined. We nevertheless believe and assume arguendo that seropositive prisoners enjoy some significant constitutionally-protected privacy interest in preventing the non-consensual disclosure of their HIV-positive diagnoses to other inmates, as well as to their families and other outside visitors to the facilities in question.

941 F.2d 1495, 1513 (11th Cir. 1991). In a footnote to this passage the Panel reasoned:

> Although the Constitution does not explicitly establish a right of privacy, the Supreme Court has recognized for almost a century that certain rights of personal privacy do exist. In Whalen v. Roe, the Supreme Court observed that its "privacy" jurisprudence, grounded primarily in the

> fourteenth amendment's concept of personal liberty and restrictions upon state action, delineates at least two different kinds of privacy interests. Whalen v. Roe, 429 U.S. 589, 598-99 & n. 23 (1977). "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Id. at 599-600 (footnotes omitted).
>
> Appellants apparently claim that both such interests are implicated in the instant setting. The nature of the right claimed by appellants is perhaps most aptly described as a right to privacy in preventing the non-consensual disclosure of one's medical condition or diagnosis. See Doe v. Coughlin, 697 F.Supp. at 1237. There is some authority supporting such a right. The scope of such a right, however, is far from settled, and we need not divine its precise parameters here, given our holding infra that any such right is outweighed by the legitimate penological interests of the Alabama DOC.

Id. 1513 n.26 (citations omitted).

Confronted with a parallel claim the Second Circuit's Doe v. City of New York reflected:

> Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over. Clearly, an individual's choice to inform others that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should normally be allowed to make for herself. This would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease. An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information. We therefore hold that Doe possesses a constitutional right to confidentiality under Whalen in his HIV status.

15 F.3d 264, 267 (2d Cir.1994). See also Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999) ("Within narrow parameters, the question of whether the privacy of certain medical conditions should be constitutionalized has been answered by Doe in the affirmative. We now hold, as the logic of Doe requires, that individuals who are transsexuals are among

those who possess a constitutional right to maintain medical confidentiality."). See also Nolley v. County of Erie, 776 F.Supp. 715, 728 -732 (W.D.N.Y. 1991) (holding that prison inmates are protected by a constitutional right to privacy from the unwarranted disclosure of their HIV status.).

Finally, the Third Circuit's Doe v. Delie addressed the claim by an HIV positive inmate who alleged that when he was being taken to sick call appointments, staff informed the escorting officers of his medical condition, that during physician visits the staff kept the door to the clinic room open which allowed officers, inmates, and guards in the area to see and hear Doe's treatment, and that while administering medication, nurses announced his medication loudly enough for others to hear. 257 F.3d 309, 311-12 (3d Cir. 2001). The Court explained:

> An individual has a constitutional right to privacy which protects "the individual interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 599 (1977). We have long recognized the right to privacy in one's medical information: "There can be no question that ... medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection." United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir.1980). ... [T]he privacy interest in information regarding one's HIV status is particularly strong because of the stigma, potential for harassment, and "risk of much harm from non-consensual dissemination of the information." [Doe v. Southeastern Pa. Transportation Authority, 72 F.3d 1133,] 1140 [3d Cir. 1995)].

Id. at 315. "It is beyond question," the Panel stated, "that information about one's HIV-positive status is information of the most personal kind and that an individual has an interest in protecting against the dissemination of such information." Id. at 317. It rejected the District Court's conclusion that the right to privacy does not exist in prison: "[A] prisoner's right to privacy in this medical information is not fundamentally

inconsistent with incarceration. Therefore, we join the Second Circuit in recognizing that the constitutional right to privacy in one's medical information exists in prison." 257 F.3d at 317.

There is no right

The Sixth Circuit does not recognize a right to privacy in medical records in, Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir. 1994), or, as the First Circuit noted in Borucki, outside of prison, J.P v. DeSanti, 653 F.2d 1080 (6th Cir 1981).

In Anderson v. Romero, a case that turned on the qualified immunity question, Judge Posner undertook an extensive inquiry into the question of whether any such right even exists under the Constitution, 72 F.3d 518, 521 -23 (7th Cir. 1995), commencing with a "brief sketch of the history of the legal concept of privacy, id. at 521-22. He indicated: "A right to conceal one's medical history is readily derivable from the branch of the tort of invasion of privacy that protects people against the indiscriminate publicizing of intimate details of their personal lives. But that branch has evolved mainly as a part of the common law, rather than of the constitutional law, of privacy." Id. at 522.

With respect to Whalen and Nixon Posner reasoned:

> The strongest precedent in the Supreme Court for recognizing a constitutional right to conceal one's medical history is Whalen v. Roe, 429 U.S. 589 (1977). The holding was that a statute which required the maintenance of records of the identity of people for whom physicians prescribed certain dangerous though lawful drugs did *not* invade any constitutional right of privacy. The Court implied, however, that the disclosure by or under the compulsion of government of a person's medical records might invade a constitutional right of privacy, presumably a "substantive due process" right, though the opinion is very vague on this, perhaps deliberately so. See id. at 598-600, 605-06. A subsequent case, Nixon v. Administrator of General Services, 433 U.S. 425, 457-58 (1977), is more explicit about the existence of a constitutional right of privacy of personal papers, though they were not in that case medical records and, again, the plaintiff lost.

Id. Posner then addresses the inter-circuit analysis of the right in non-inmate cases:

> A number of cases in the lower federal courts, including our own, building on Whalen and Nixon, recognize a qualified constitutional right to the confidentiality of medical records and medical communications. See, e.g., Pesce v. J. Sterling Morton High School, 830 F.2d 789, 795-98 (7th Cir.1987). The existence of the right was described as an open question in Borucki v. Ryan, 827 F.2d 836, 848 (1st Cir.1987), and the right has been expressly rejected by the Sixth Circuit. J.P. v. DeSanti, 653 F.2d 1080, 1087-91 (6th Cir.1981); Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir.1994). But it is recognized by our court and was in 1992.

Id. (some citations omitted). "None of the cases that have recognized the right involve inmates," Posner observed, adding, "Obviously they do not have all the rights of free persons." Id.

Posner concluded that Harris v. Thigpen, 941 F.2d 1495, discussed above, was too equivocal about the existence of such a right in the prison setting to rely on it as establishing its existence. Id. at 523. Posner then did a leapfrog of sorts, stating:

> Now, even if there is no such right, we can assume that certain disclosures of medical information or records would be actionable. But they would be actionable under the cruel and unusual punishments clause of the Eighth Amendment rather than under the due process clause of the Fourteenth. If prison officials disseminated humiliating but penologically irrelevant details of a prisoner's medical history, their action might conceivably constitute the infliction of cruel and unusual punishment; the fact that the punishment was purely psychological would not excuse it. E.g., Thomas v. Farley, 31 F.3d 557, 559 (7th Cir.1994); Joseph v. Brierton, 739 F.2d 1244, 1246 (7th Cir.1984); Williams v. Boles, 841 F.2d 181, 183 (7th Cir.1988); Northington v. Jackson, 973 F.2d 1518, 1523 (10th Cir.1992). We can imagine, also, that branding or tattooing HIV-positive inmates (the branding of persons who are HIV-positive was once seriously proposed as a method of retarding the spread of AIDS), or making them wear a sign around their neck that read "I AM AN AIDS CARRIER!," would constitute cruel and unusual punishment. So too if employees of the prison, knowing that an inmate identified as HIV positive was a likely target of violence by other inmates yet indifferent to his fate, gratuitously revealed his HIV status to other inmates and a violent attack upon him ensued. Cf. Bowers v. DeVito, 686 F.2d 616 (7th Cir.1982), and the

Billman case, discussed below; also Abraham Abramovsky, "Bias Crime: A Call for Alternative Responses," 19 Fordham Urban L.J. 875 (1992).

Id. at 523. The Seventh Circuit is still equivocating about the constitutional stature of an inmate's medical information. See Franklin v. McCaughtry, No. 04-1672, 2004 WL 2202528, 2 (7th Cir. Sept. 23, 2004) (unpublished order) (remarking "we have not previously held in a published opinion that they enjoy a constitutional right to privacy in their medical information" distinguishing Doe v. Delie, 257 F.3d 309, 317 (3d Cir.2001) and Powell v. Schriver, 175 F.3d 107, 112 (2d Cir.1999), as involving "purposeful dissemination of intensely private medical information," from the plaintiff's allegations of unintentional, semi-public dissemination of a cancerous finger sore, diabetes, the need for eyeglasses, and other fairly pedestrian maladies).

In Tokar v. Armontrout, the Eighth Circuit followed Anderson in addressing a claim that the segregation of a HIC-positive inmate disclosed his medical condition. 97 F.3d 1078 (8th Cir. 1996). The Panel agreed that the law was not "clearly established that a prison cannot without violating the constitutional rights of its HIV-positive inmates reveal their condition to other inmates and to guards in order to enable those other inmates and guards to protect themselves from infection." Id. at 1084. It circumvented the question of whether or not there was a right to privacy on those facts. See id. at 1084 n.9.

Based on the discussion of a right to non-disclosure of private medical information relied upon by the First Circuit in Borucki, and the reasoning of the Seventh Circuit in Pesce v. J. Sterling Morton High School, the Eleventh Circuit's Harris v. Thigpen, the Second Circuit's Doe v. City of New York, and the Third Circuit's Doe v.

Delie, I conclude that there is a Fourteenth Amendment right to privacy that protects private medical information from unjustified disclosure by governmental actors. Even Anderson, citing Pesce, concedes that the Seventh Circuit recognizes a qualified constitutional right to the confidentiality of medical records and medical communications. While Judge Posner observes that it is obvious that inmates do not have "all the rights of free persons" it would be very odd indeed if the right to privacy that protects private medical information from unjustified disclosure by governmental actors is forfeited outright when an inmate passes through the entrance of a correctional facility and commences service of his sentence. Indeed, in Houchins v. KQED, Inc. the Supreme Court stated: "Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however "educational" the process may be for others." 438 U.S. 1, 5 n.2 (1978).

I can discern no reason why the constitutionality of any infringement of the Fourteenth Amendment right would not be analyzed under Turner v. Safley, 482 U.S. 78 (1987). See Borucki, 827 F.2d at 848 n.21 (recognizing that any disclosure of private information would be analyzed vis-à-vis some sort of balancing test). Turner involved, in addition to another claim, a challenge to a prison's mail policy that prohibited inmate-to-inmate correspondence. Recognizing that the policy implicated the inmates' fundamental, First Amendment rights, the Court concluded that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. In my opinion this is the way to proceed with claims alleging violations of the Fourteenth Amendment right to privacy.

See Doe v. Delie, 257 F.3d at 315, 317 (noting that inmates retain those rights that are not inconsistent with their status as prisoners, and that these interests can be curtailed by a policy or regulation that is shown to be reasonably related to legitimate penological objectives of the corrections system); Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999) ("A regulation that 'impinges on inmates' constitutional rights' is therefore valid only if it 'is reasonably related to legitimate penological interests.' Turner, 482 U.S. at 89. ... [A] prison officials can impinge on that right only to the extent that their actions are 'reasonably related to legitimate penological interests.'"); Nolley, 776 F.Supp. at 732 ("The court reaffirms ... that [the prison's] practice of placing red stickers on plaintiff's documents and other items disclosed her HIV status to staff and inmates who were exposed to the stickers. The question under Turner v. Safley is whether the regulation which led to these disclosures was nevertheless reasonably related to legitimate penological interests.").

Turner explains that "several factors are relevant in determining the reasonableness of the regulation at issue." 482 U.S. at 89. "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." Id. Second, the court should examine "whether there are alternative means of exercising the right that remains open to prison inmates." Id. at 90. "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." Id. "Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation." Id.

In Powell, the Second Circuit concluded "that the gratuitous disclosure of an inmate's confidential medical information as humor or gossip--the apparent circumstance of the disclosure in this case-- is not reasonably related to a legitimate penological interest, and it therefore violates the inmate's constitutional right to privacy." 175 F.3d at 112. The Panel reflected:

> It is easy to think of circumstances under which disclosure of an inmate's HIV-positive status would further legitimate penological interests. Several circuits have upheld against constitutional challenge the practice of segregating HIV-positive prisoners from the rest of the prison population, on the theory that such segregation is a reasonable anti-contagion measure even though it incidentally and necessarily effects disclosure. See, e.g., Moore v. Mabus, 976 F.2d 268, 271 (5th Cir.1992); Harris v. Thigpen, 941 F.2d 1495, 1521 (11th Cir.1991). And the Seventh Circuit has held that the constitutional rights of an HIV-positive inmate are not infringed when prison officials undertake to warn prison officials and inmates who otherwise may be exposed to contagion, even if those warnings are administered on an ad hoc basis. See Anderson v. Romero, 72 F.3d 518, 525 (7th Cir.1995).

Id. at 112-13.

Doe's allegations also bespeak (at best) a gratuitous disclosure of his medical condition to other inmates. I agree with Powell, that such action (and certainly not a disclosure made for the purpose of humiliating an inmate) cannot be viewed as serving a legitimate penological purpose. Accordingly, Doe's complaint states a claim for a violation of his constitutional right not to have his HIV/AIDS status disclosed to others.

Was the Right Clearly Established?

The discussion above demonstrates quite pointedly that the question of whether or not inmates have a Fourteenth Amendment right to privacy that protects private medical information from disclosure (not justified by legitimate penological reasons) by

governmental actors was not clearly established by June 3, 2003. Certainly neither the Supreme Court nor the First Circuit had decisions that established this proposition.

The Third Circuit's Doe v. Delie undertook an extensive inquiry into the clearly established prong of the qualified immunity analysis. The plaintiff argued that the right was clearly established because, one, a Pennsylvania statute created the right and also informed the defendants of the existence of the right; two, that by 1995 there was a growing consensus among the courts that inmates possessed this right; and, three, a class action settlement in the District Court had put the defendants on specific notice of this right to privacy in medical records. 257 F.3d at 318. The Panel responded first, that, with respect to the first argument, the Supreme Court has held in Davis v. Scherer, 468 U.S. 183 (1984) "that officials do not forfeit qualified immunity from suit for violation of a federal constitutional right because they failed to comply with a clear state statute." Id. (citing Davis, 468 U.S. at 195). With respect to the case law related arguments, the Panel found the Eleventh Circuit's Harris opinion to be equivocal, pointing to its "arguendo" assumption of the right in ultimately rejecting the claim on Turner-type grounds. Doe v. Delie, 257 F.3d at 319; see also id. (citing pre-1995 cases upholding segregation of HIV-positive inmates).

The Court opined:

> In short, none of these decisions, individually or collectively, makes it sufficiently clear to reasonable officials that their conduct violated a prisoner's federal constitutional right. District court opinions may be relevant to the determination of when a right was clearly established for qualified immunity analysis. However, in this case, the absence of binding precedent in this circuit, the doubts expressed by the most analogous appellate holding, together with the conflict among a handful of district court opinions, undermines any claim that the right was clearly established in 1995.

Id. at 321 (footnotes omitted). It also rejected the argument that the Department of Corrections agreement to settle a case "clearly establish a federal constitutional right" noting that in the case "the factual and legal issues were numerous, broad and complex, the decision to settle a case cannot be elevated to the recognition of a constitutional right." Id. at 322.

The Second Circuit's Powell likewise concluded that the right was not clearly established. It stated:

> This Court's controlling precedent on the right to maintain the confidentiality of medical information issued in 1994 with the holding in Doe v. City of New York, 15 F.3d 264 (2d Cir.1994), and even so, that case did not address the applicability of that right to prison inmates. As of 1991, our sister circuits were in disagreement or noncommittal on the question decided in Doe.

Powell, 175 F.3d at 113-14. See also Gill v. Defrank, Civ. No. 98-7851, 2000 WL 897152, 2 -3 (S.D.N.Y. July 6, 2000)("This Court's controlling precedent on the right to maintain the confidentiality of medical information issued in 1994 with the holding in [Doe v. City of New York, 15 F.3d 264 (2d Cir. 1994)], and even so, that case did not address the applicability of that right to prison inmates. Accordingly, Gill's right to privacy regarding his HIV status was not clearly established law in 1997, and thus defendants are entitled to qualified immunity on this claim.").

In Pouliot even though I found no constitutional claim I addressed the clearly established prong of the qualified immunity inquiry:

> Not all governmental disclosures of personal confidential information implicate the right of privacy. As of 1992, there was not a clearly established constitutional right to privacy in the non-disclosure of confidential information. See Hansen v. Lamontagne, 808 F.Supp. 89, 94 (D.N.H.1992). Some courts found that the constitutional right to privacy encompasses nondisclosure of HIV status, information related to AIDS, and mental health information. See Doe v. Town of Plymouth, 825

> F.Supp. 1102, 1107 (D.Mass.1993) (collecting cases). One of our sister courts found that the disclosure of plaintiff's HIV status was a protected privacy interest in Doe v. Town of Plymouth, 825 F.Supp. 1102 (D.Mass.1993). Although there are no First Circuit cases squarely on point, the Court has held that as of 1983, the state's dissemination of a plaintiff's personal psychiatric information was not clearly established as protected by the confidentiality branch of the right of privacy. See Borucki, 827 F.2d at 845.
>
> The discussion above of the pre-existing law clearly shows that the contours of the confidentiality branch were not sufficiently established in 1999 to find that a reasonable officer would have understood that stating Pouliot was being treated for diabetes was a constitutional violation of the right to privacy.

226 F.Supp.2d at 249 (footnote omitted).[8]

Thus, it is with confidence that I conclude that, with respect to an inmate's Fourteenth Amendment right not to have private medical information disclosed to other inmates by governmental actors who were not proceeding on the basis of a legitimate penological reason, such a right was not clearly established by June 3, 2003.[9]

Doe's Eighth Amendment Claim

"A prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the Eighth Amendment. Farmer v. Brennan, 511 U.S. 825, 828-29 (1994) (citing Helling v. McKinney, 509 U.S. 25 (1993), Wilson v. Seiter, 501 U.S. 294

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[8] In Wilson v. Layne the Supreme Court reflected with respect to the Fourth Amendment claim before it: "Given such an undeveloped state of the law, the officers in this case cannot have been 'expected to predict the future course of constitutional law.'" Wilson v. Layne, 526 U.S. 603, 617(1999). It stated: "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." Id. at 618.

[9] While I have attempted "to set forth principles which [might] become the basis for a holding that a right is clearly established," Saucier, 533 U.S. at 201, given the unsettled nature of the question, even if I am right on the first prong inquiry, it may be sometime before the clearly established question vis-à-vis this right can be answered in the affirmative with confidence.

(1991), and Estelle v. Gamble, 429 U.S. 97 (1976)). This standard is applicable to claims involving deprivation of proper health care and failure to protect. As Farmer explains[10]:

> The Constitution "does not mandate comfortable prisons," Rhodes v. Chapman, 452 U.S. 337, 349 (1981), but neither does it permit inhumane ones, and it is now settled that "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment," Helling, 509 U.S., at 31. In its prohibition of "cruel and unusual punishments," the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. See Hudson v. McMillian, 503 U.S. 1 (1992). The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must "take reasonable measures to guarantee the safety of the inmates," Hudson v. Palmer, 468 U.S. 517, 526-527 (1984).
>
> In particular, as the lower courts have uniformly held, and as we have assumed, "prison officials have a duty ... to protect prisoners from violence at the hands of other prisoners." Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (CA1)(internal quotation marks and citation omitted), cert. denied, 488 U.S. 823(1988). Prison conditions may be "restrictive and even harsh," Rhodes, supra, 452 U.S., at 347, but gratuitously allowing the beating or rape of one prisoner by another serves no "legitimate penological objectiv[e]," Hudson v. Palmer, supra, 468 U.S., at 548 (STEVENS, J., concurring in part and dissenting in part), any more than it squares with " 'evolving standards of decency,' " Estelle, supra, 429 U.S., at 102 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). Being violently assaulted in prison is simply not "part of the penalty that criminal offenders pay for their offenses against society." Rhodes, supra, 452 U.S., at 347.
>
> It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety. Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, "sufficiently serious," Wilson, supra, 501 U.S., at 298; see also Hudson v. McMillian, supra, 503 U.S., at 5; a prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities," Rhodes, supra, 452 U.S., at 347. For a claim (like the one here) based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. See Helling, supra, 509 U.S. at 35.

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[10] I excerpt Farmer at some length because, as illustrated by some of the discussion in the cases cited below, it is easy to lose sight of the key starting point for analyzing physical and psychological safety claims such as Doe's under the Eighth Amendment.

Id. at 832-834 (footnotes and some citations omitted). The Court held in Farmer that:

> a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. at 837

In his complaint Doe alleges that immediately after Smith and Collins revealed Doe's medical condition to the inmate population he was harassed. (Compl. ¶ 34.) On many occasions, while walking to chow on the long narrow concrete walkway (bloody mile) numerous inmates hollered innuendoes and other very embarrassing comments about Doe's medical condition. (Id. ¶ 35.) Doe asserts that MSP is a very violent institution since it was moved to its current Warren, Maine location. (Id. ¶ 36.)

I conclude that Doe's allegations do not state an Eighth Amendment claim for failure to protect as he does not allege that he was actually harmed physically or suffered severe psychological injury as a consequence of the exposure of his HIV/AIDS status. In my view his allegations of hollered innuendos and embarrassing comments and a generalized belief that the prison was violent does not meet either prong of Farmer; this harassment was neither objectively serious nor can it be said that these allegations support a conclusion that Doe's exposure as HIV positive, while allegedly deliberate within the meaning of Farmer, was deliberate vis-à-vis putting him in a substantial risk of serious harm.

As a general rule threats and harassment alone, even when they come directly from the mouth of a correctional officer, will not constitute cruel and unusual punishment under Farmer. For instance, in Johnson v. Unknown Dellatifa the Sixth Circuit analyzed

a claims that a correctional officer continuously banged and kicked the inmate's cell door, threw his food trays through the bottom slot of his cell door so hard that the top flew off, made aggravating remarks to him, made insulting remarks about his hair being too long, growled and snarled through his window, smeared his window to prevent him from seeing out of it, behaved in a racially prejudicial manner toward him, and jerked and pulled him unnecessarily hard when escorting him from his cell. 357 F.3d 539 (6th Cir. 2004). The inmate asserted that the officer knew that he suffered from hypertension and intentionally harassed him in an attempt to cause him to suffer a heart attack, stroke or nervous breakdown. Id. at 546. The Panel held "that harassment and verbal abuse" by guards "do not constitute the type of infliction of pain that the Eighth Amendment prohibits." Id. See also, e.g., McBride v. Deer, 240 F.3d 1287, 1291 n.3 (10th Cir. 2001) (addressing a claim that officers threatened to spray inmate with mace, stating that "acts or omissions resulting in an inmate being subjected to nothing more than threats and verbal taunts do not violate the Eighth Amendment."); DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000) ("Standing alone, simple verbal harassment does not constitute cruel and unusual punishment, deprive a prisoner of a protected liberty interest or deny a prisoner equal protection of the laws."); Calhoun v. Hargrove, 312 F.3d 730, 734 (5th Cir.2002) (addressing allegations that the inmate was verbally abused, was once forced to beg for a meal (which he eventually received), and forced to work beyond the medical limitations set for him causing him to have dangerously elevated blood pressure, concluding that such a claim was not actionable under 42 U.S.C. § 1983); Barney v. Pulsipher, 143 F.3d 1299, 1311 (10th Cir. 1998) (addressing allegations that officer subjected inmates to severe verbal sexual harassment and intimidation, stating that "these

acts of verbal harassment alone are not sufficient to state a claim under the Eighth Amendment," and that the claims of verbal harassment ere actionable "[i]n combination" with the alleged sexual assaults, then focusing on plaintiffs' sexual assault claims); Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996) (observing that there was no claim predicated on prison guards' "disrespectful and assaultive comments" that were not "unusually gross even for a prison setting" with no evidence that they were "calculated to and did cause him psychological damage," just that they denied him "peace of mind"); Edwards v. Gilbert, 867 F.2d 1271, 1274 n.1 (11th Cir.1989)(observing that there were no allegations that the inmate was in danger of serious physical harm from adult inmates at the jail, noting that the threats concerned what would happen when he got to state prison and stressing that he would need to allege more than that he has been subjected to distressing verbal taunts to state a claim regarding their duty of protection or deprived the petitioner of his constitutional rights); McDowell v. Jones, 990 F.2d 433, 434 (8th Cir.1993) (inmate's claims of general harassment and of verbal harassment were not actionable under § 1983); Shabazz v. Cole, 69 F.Supp.2d 177, 199 -200 (D.Mass.1999) ("Although this court does not condone the verbal abuse with the racial epithets that Shabazz received from Cole, verbal threats and insults between inmates and prison officials are a "constant daily ritual observed in this nation's prisons." Shabazz v. Pico, [994 F.Supp. 460, 474 (S.D.N.Y.1998)]. Without more, "racial slurs do not deprive prisoners of the 'minimal civilized measure of life's necessities,' and thus do not constitute an [E]ighth [A]mendment violation.").

There is precedent for the proposition that an allegation of actual or imminent physical harm is not a necessary element of an Eighth Amendment claim. For instance,

in Benfield v. McDowall, the Tenth Circuit decided that the motion to dismiss on qualified immunity grounds should not have been granted in a case involving officer labeling inmate a snitch. 241 F.3d 1267, 1271-72 (10th Cir. 2001). Addressing the "difficult question is whether damages will lie in the absence of physical injury," the Panel decided "that the Eighth Amendment may be implicated not only [by] physical injury, but also by the infliction of psychological harm." Id. However, it also stated: "The actual extent of any physical injury, threats or psychological injury is pertinent in proving a substantial risk of serious harm." Id. Doe's own allegations, which are very precise, are not on the same plane as those of the plaintiff in Benfield who alleged that the officer "put him in danger of attack or even death at the hands of other inmates by circulating rumors that he was a snitch and by showing other inmates a letter he allegedly wrote, indicating that he was giving information to the prison investigations staff." Id. at 1270. These allegations suggest that the defendant was hoping to incite violence towards the plaintiff.

Likewise, in Chandler v. District of Columbia Dept. of Corrections the issue of District of Columbia Circuit Court analyzed an "issue first impression: Do a prisoner's allegations that a guard threatened to have him killed and that prison officials ignored his consequent administrative complaints state claims upon which relief could be granted?" 145 F.3d 1355, 1360-361 (D.C. Cir.1998). The Court concluded that a motion to dismiss was improvidently granted, explaining:

> If we credit his allegations, Corporal Brooks's threat put Chandler in imminent fear of his life because she was in a position to carry it out. Depending on the gravity of the fear, the credibility of the threat, and on Chandler's psychological condition, the threat itself could have caused more than de minimis harm and therefore could have been sufficient to state a claim of excessive use of force. These issues cannot be resolved

> without more factual development. Furthermore, the risk that Corporal Brooks's threat might be carried out, if left unaddressed (a matter upon which the district court made no findings), could amount to "a sufficiently substantial 'risk of serious damage to [Chandler's] future health,' " Farmer, 511 U.S. at 843, to be actionable as an unconstitutional condition of confinement. Finally, Chandler pleads with sufficient particularity that Corporal Brooks and the other Lorton officials acted with intent to harm him or in knowing disregard of his mental anguish and risk of being killed. Further inquiry may reveal that the correctional officers lacked the necessary intent, but such a conclusion is unwarranted at this stage of the litigation.

Id.

In my view, even if this case were binding on this court, it does not save Doe's claim from dismissal. This disclosure of Doe's HIV status is not on par with first hand threats on an inmate's life that could certainly put an inmate in imminent fear that the threat will be carried out. Doe does not allege that, in response to the discovery of his status, the inmates even suggested that they would attack him as a consequence. He relies only on the general dangerousness of the prison which, alone, is not sufficient to save his Eighth Amendment claim.

As excerpted above, Judge Posner indicated in Anderson that disclosure of sensitive medical information to other inmates could possibly give rise to an Eighth Amendment claim. See 72 F.3d at 523. He reasoned that the resulting harassment could rise to such a level that it constituted the infliction of cruel and unusual psychological punishment, relying on Thomas v. Farley, 31 F.3d 557, 559 (7th Cir.1994); Joseph v. Brierton, 739 F.2d 1244, 1246 (7th Cir.1984), Williams v. Boles, 841 F.2d 181, 183 (7th Cir.1988), and Northington v. Jackson, 973 F.2d 1518, 1523 (10th Cir.1992)). Id. In Thomas the Panel observed in dicta that mental torture "is not an oxymoron, and has been held or assumed in a number of prisoner cases to be actionable as cruel and unusual

punishment." 31 F.3d at 559 (emphasis added)(citations omitted). Joseph is a case which addressed a claim of inadequate psychiatric treatment that the Panel indicated could be actionable as a cruel and unusual punishment claim under Estelle v. Gamble, 429 U.S. 97 (1976)'s denial of proper medical care standard, if the denial of proper care was willful. 739 F.2d at 1246. The Williams Panel addressed a claim that the inmate was assaulted by a guard wielding a pipe and was sprayed with Mace by other guards on another occasion, all without cause, and turned on whether his physical injury was sufficiently severe. 841 F.2d at182-83. And the Tenth Circuit's Northington concluded that factual allegations that officers arbitrarily tormented the inmate (who was on the way from the jail to a community placement worksite) by threatening to kill him and physically abusing him stated a claim even though it did not specify exactly what type of physical abuse the corrections officers allegedly inflicted, observing that it did allege that one of the defendants put a service revolver to his head and threatened to shoot. 973 F.2d at 1523 - 24.

It may well be true that an inmate can state an Eighth Amendment claim by alleging threats (maybe even harassment) so severe that the harm would be sufficiently substantial under Farmer. I conclude, however, that Doe's allegations do not bring his Eighth Amendment count into the ballpark of such a claim.

State Law Claims

All of Doe's remaining counts are predicated under state law. If the Court accepts my recommendation regarding Doe's federal claims, I recommend that the Court decline to exercise its supplemental jurisdiction over the remaining counts. See 28 U.S.C. 1367(c); Rodríguez v. Doral Mortgage Corp., 57 F.3d 1168, 1177 (1st Cir.1995) ("As a

general principle, the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit ... will trigger the dismissal without prejudice of any supplemental state-law claims."); accord Gonzalez-De-Blasini v. Family Dept., 377 F.3d 81, 89 (1st Cir. 2004).

Conclusion

For the reasons here stated, I recommend the Court **GRANT** the motion to dismiss as to the Fourteenth Amendment claim because the defendants are entitled to qualified immunity. With respect to the Eighth Amendment claim, I recommend that the court **GRANT** the motion to dismiss for failure to state a claim. As for the state law claims, I recommend that the court decline to exercise supplemental jurisdiction and **DISMISS** those counts **without prejudice**.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

March 21, 2005.

/s/Margaret J. Kravchuk
U.S. Magistrate Judge

DOE v. MAGNUSSON et al
Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Date Filed: 08/04/2004
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil

Cause: 42:1983 Prisoner Civil Rights

Rights
Jurisdiction: Federal Question

Plaintiff

JOHN DOE

represented by **JOHN DOE**
33 SECOND STREET
MILO, ME 04463
PRO SE

V.

Defendant

MARTIN MAGNUSSON
Individually and in his official capacity

represented by **GWENDOLYN D. THOMAS**
ASSISTANT ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333-0006
626-8800
Email: gwen.thomas@maine.gov
ATTORNEY TO BE NOTICED

Defendant

JEFFREY MERRILL
Individually and in his official capacity

represented by **GWENDOLYN D. THOMAS**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

BEN SMITH
Individually and in his official capacity

represented by **GWENDOLYN D. THOMAS**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

MICK COLLINS
Individually and in his official capacity

represented by **GWENDOLYN D. THOMAS**
(See above for address)
ATTORNEY TO BE NOTICED